

1 COPYRIGHT ROYALTY TRIBUNAL

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PUBLIC BROADCASTING PROCEEDINGS :
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9 Postal Rate Commission
10 2000 L Street, N.W.
Room 500
11 Washington, D.C.

12 Thursday, April 6, 1978

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14 The hearing in the above-entitled matter
15 commenced at 10 a.m., before:

16 COMMISSIONER THOMAS C. BRENNAN, CHAIRMAN

17 COMMISSIONER DOUGLAS E. COULTER

18 COMMISSIONER MARY LOU BURG

19 COMMISSIONER CLARENCE L. JAMES, Jr.

20 COMMISSIONER FRANCES GARCIA

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P R O C E E D I N G S

CHAIRMAN BRENNAN: The hearing will resume.

We are meeting this morning to consider pictorial, graphic and scultural works. We will follow the rules that were previously adopted for this proceeding.

There is only one request to be heard on behalf of the proprietors of such works. Mr. Martin Bressler, who is appearing on behalf of the Visual Artists and Galleries Association, Incorporated. We welcome you, Mr. Bressler. You have not previously appeared in this proceeding, so would you please stand and be sworn. Whereupon,

M A R T I N B R E S S L E R

was called as a witness herein and, after being first duly sworn, was examined and testified as follows:

CHAIRMAN BRENNAN: You may proceed as you wish.

MR. BRESSLER: Thank you, Mr. Chairman, members of the panel. I am appearing, as the Chairman said, on behalf of the Visual Artists and Galleries Association. I am the founder of the organization and its counsel.

Before starting to read my brief presentation, I just want to make some comments. I think that the PBS negotiators ought to be acknowledged that they have worked hard and long in negotiating with different elements of

1 the visual arts community. They are extremely adroit
2 negotiators. I have every reason to believe that the
3 negotiations were conducted in good faith, I know
4 they were from our part and I believe they were on the
5 part of PBS.

6 As of this point negotiations have failed.
7 Discussions will continue I believe, and it is hoped that
8 some arrangement can be made. I make no assumption,
9 however, that an arrangement will be made.

10 And I am before this Tribunal on behalf of
11 VAGA on the assumption that it is for this Tribunal to
12 fix the royalty rates for the visual arts as set forth
13 in Section 118. I appear only for Visual Artists and
14 Galleries Association.

15 The Visual Artists and Galleries Association,
16 Inc., which we will call VAGA is a recently formed
17 organization of visual artists and art galleries. Our
18 purpose, in addition to serving as a trade association,
19 is to license reproduction and display rights of our members,
20 and to protect them against unauthorized use. We are a
21 subsidiary of VAGA Foundation, Inc., a non-profit corporation.
22 A brochure setting out what VAGA is about is attached to
23 the papers which the Commissioners have.

24 I might say that although VAGA was in formation
25 for a period of two years, we started officially doing

1 business as of January 1 of this year, and we are
2 doing a membership drive as of this point.

3 As of this date, VAGA represents approximately
4 200 American artists and galleries. VAGA is also the
5 exclusive representative in the United States for a number
6 of European organizations, large and small, including
7 SPADEM, A French reproduction rights society with
8 approximately 2,700 artist members; VAAP, a similar Soviet
9 society with approximately 10,000 members, which I
10 believe are all of the artists in the Soviet Union;
11 Bild-Kunst, a West German group with 1,100 members; and
12 Beeldrecht, a Netherlands association with 25 members.

13 Other organizations whose members are represented
14 by VAGA are Cosmopress of Switzerland; SIAE in Italy;
15 SABAM in Belgium; ARAPB also in Belgium; Hugart in
16 Hungary; SPA in Portugal; and BSDA in Senegal. Membership
17 lists of VAGA, SPADEM and Bild-Kunst and Beeldrecht are
18 annexed in the paper before the Commissioners.

19 An examination of the membership lists shows
20 that the visual artists represented by VAGA before this
21 Tribunal include both the famous household names, like
22 Picasso, Miro, David Smith, Rauschenberg, and Motherwell,
23 as well as the relatively unknown.

24 Yet it is with trepidation that VAGA comes
25 before this Tribuna, since we are largely uncharted waters

1 and there are very few guidelines to follow. VAGA has no
2 economic surveys to bring to this panel to demonstrate
3 how much the royalty rates should be and how they should
4 be collected. For reasons that are beyond these hearings
5 visual artists in the United States seem to be among the
6 last group of creative artists to organize themselves.
7 Virtually all of their economic activities have been conducted
8 on an ad hoc, one-to-one basis, no consistent pattern
9 emerges. While we have little precedent upon which to
10 base specific recommendation to this Tribunal, there are,
11 however, certain benchmarks which may be of assistance to
12 you.

13 (1) The preference given to Public Broadcasting
14 is the compulsory licensing provisions of Section 118
15 themselves, not the royalty rates to be established.
16 Congress has, in its wisdom, determined that Public
17 Broadcasting must be given the right to display published
18 works of art. In our free society, this compulsion, in
19 and of itself, is a burden upon the visual artists.
20 The artist simply does not have the option of saying "no".
21 It is not important whether he or she wants to say "no", but
22 whether he or she has the right to do so. The artist no
23 longer does.

24 This legislative dictate does not, however, carry
25 with it a further requirement that the visual artist

1 subsidize Public Broadcasting. This was made clear
2 when, in the Senate Report on the new Copyright Law, i-
3 was said--in a slightly different context--that: "--as such,
4 this provision does not constitute a subsidy of Public
5 Broadcasting by the Copyright proprietors since the amendment
6 requires the payment of copyright royalties reflecting
7 the fair value of the materials used."

8 Thus, the preference contemplated by Congress
9 for Public Broadcasting is the compulsory license itself,
10 not the rate of fees to be paid.

11 (2) As a compulsory license, the rights
12 granted to Public Broadcasting should be no more than
13 that provided by statute.

14 While we concede that a rule of reason must
15 apply so that implementation of the compulsory license
16 does not become burdensome, alleviation of the burden
17 should not be at the expense of the artist. For example,
18 Public Broadcasting has proposed license that is submitted
19 to this Tribunal, desires to pay only on displays
20 appearing on PBS distributed programs.

21 The statute grants the compulsory license to
22 a "Public Broadcasting entity", which, in 118g is defined
23 as a "non-commercial educational broadcasting station".
24 Royalties ought to be fixed by this Tribunal for use by
25 such entity, not by the system or the network itself.

1 If, however, as PBS contends, monitoring of local
2 programs is administratively costly, then alternative
3 courses are available. Two come to mind:

4 (A) A sampling technique may be developed
5 which adequately predicts substantially all uses made by
6 local stations of works of art. Sampling has become a
7 refined science for the communications industry. And
8 adaptation for these purposes seem reasonable; and

9 (B) Public Broadcasting could choose to have
10 local programming outside of the compulsory licensing
11 provisions of Section 118. It could let each use be
12 subject to separate negotiation.

13 Ironically, VAGA has only just received a
14 request by Public Broadcasting's Channel 13 in New York
15 for the use of some work by Fernand Leger, whose a
16 member of SPADEM. The original request was for world-wide
17 rights of unlimited duration and use. By negotiation,
18 Channel 13 is now willing to accept six plays--repeats--
19 within the United States for a period of five years.
20 Copies of the Channel 13 correspondence is annexed to
21 this paper. The local station initiated and concluded
22 the transaction regardless of whether the program would
23 ultimately be distributed by PBS.

24 We are unaware of anything in the statute which
25 states that local stations must accept the compulsory license.

1 If indeed its implementation is too burdensome, then they
2 can simply reject the compulsory license and negotiate
3 with each proprietor or licensor, as Channel 13 is now
4 doing with VAGA. There's nothing that says they can't
5 do that.

6 On the other hand, the statute does state that
7 the royalties are to be fixed for use by a broadcasting
8 entity which is defined as a station for use of--for the
9 works of visual artists. We do not believe, however, that
10 the administration of local usage is excessively burdensome.

11 Since PBS is willing to pay a royalty on
12 programs on distributed by it, and concedes that such
13 programs are created by, or on behalf of local stations,
14 and then offered to the network, it is just a small step
15 to have the local stations maintain records on those programs
16 created by them which are not distributed by PBS.

17 Further, VAGA and we are sure other artists'
18 organizations as well would be pleased to submit their
19 lists of artists with addresses to every one of the 270
20 Public Broadcasting stations to facilitate their
21 reporting process. In addition to going beyond the
22 statute and seeking non-payable use of visual arts and
23 local programming, PBS in its proposed license seeks a
24 "free ride" for audio-visual usage and for foreign
25 distribution.

1 While we can understand that PBS can obtain
2 financial benefits for these uses, and the cultural
3 benefits to our society may be clear, their compulsory
4 licensing, with or without fee, is simply wrong. There
5 are commercial firms who distribute audio-visual materials
6 to educational institutions. They negotiate and pay for
7 the right to use visual art, sometimes exclusively in
8 that medium, for a period time.

9 A compulsory license for PBS interferes with the
10 artists' right to negotiate with commercial enterprises.
11 The Leger license granted by VAGA to Channel 13 that was
12 mentioned before, points up the problem with the
13 compulsory license for foreign distribution.

14 VAGA advised Channel 13 that we could not grant
15 foreign rights because we simply didn't have them with
16 Leger. Channel 13 then modified its request, and limited
17 the rights it sought to the United States only. By the
18 same token, it is difficult to see how this Tribunal
19 can mandate a use in foreign countries of works
20 which an artist does not necessarily want to display in
21 such countries. I don't think that we have that extra-
22 territorial power.

23 (3) Royalty rates should be commensurate with
24 fees paid in the past. While a cogent argument can be
25 made that, if anything, compulsory license should carry

1 a concomitantly greater reward for the artist who is
2 forced to have his or her work displayed on public
3 television, we will concede for these proceedings that the
4 rates determined by this Tribunal should be comparable to
5 what might have been charged in the past.

6 Now, that's not said sarcastically. I really
7 believe that there might very well be a reward for a
8 forced showing. I think the right to refrain from
9 showing, which has been lost for visual artists, can be
10 modified to the extent that an additional reward because
11 he is forced to show his work. We will concede, however,
12 that the rates should be comparable to what might have
13 been charged in the past.

14 As we suggested before, consistent, industry-
15 wide guidelines have been virtually non-existent. Some
16 analogs and specific examples may, however, be helpful.

17 (A) VAGA's French affiliate, SPADEM, has
18 recently entered into an agreement with French non-
19 commercial television. This was not a compulsory
20 agreement; this was a voluntary agreement. The base fee for
21 a single color broadcast is 200 francs, which I think is
22 about \$50 today. Each re-broadcast entitles the artist
23 to an additional fee. The proposed license has a one-time
24 fee for a period of five years. A copy of the contract,
25 in the original French, and in translation, which is very

1 bad and for which I apologize, is annexed in the paper
2 before the Tribunal.

3 (B) The rates determined by this Tribunal
4 as appropriate for the compulsory licensing of music is
5 certainly relevant for visual art as well. One cannot
6 conceive of a reason as to why art is not as important
7 an art form for Public Broadcasting as music. And I
8 might say the fact that the people on this side, representing
9 the visual arts, while we are not as numerous in person
10 or in strength as the representatives of ASCAP and the like,
11 I think the Tribunal must go beyond that. There is no
12 reason that I can conceive--even though our voices are
13 not as loud, we're not as numerous--why our rights are
14 any less than those that the music industry has. I
15 think that is another guideline that this Tribunal should
16 look at.

17 (C) The rates charged by stock-photo houses
18 for commercial and non-commercial television are significant
19 because they are the closest thing to standard practice in
20 the visual arts industry.

21 I call your attention to the submission to the
22 Tribunal of a position by the Coalition of Visual Arts
23 organizations which sets forth samples of what stock-photo
24 houses have been charging for television use.

25 (D) The rates charged in individual instances

1 are of some bearing because they demonstrate the type
2 of fees television is ready and capable of paying. Some
3 fourteen years ago, for example, I, on behalf of a
4 client, granted the right to display four of the client's
5 works of art for of producer of public television at a
6 fee of \$50 per illustration. If the license were granted
7 today, I believe the fee would be at least double or
8 triple that figure. That license is also attached to the
9 paper.

10 Finally, the one fee that should not be
11 relevant to the Tribunal's deliberation--that should not
12 be relevant--is the rental fee that is charged by
13 libraries, museums, publishers, or the like for a photo-
14 graph or a transparency of a visual work of art.

15 CHAIRMAN BRENNAN: Could you explain a little
16 bit what you mean by that?

17 MR. BRESSLER: Yes. I believe what happens
18 in the industry is that if a station wishes to utilize a
19 work of art, it will go to a source to get the reproduction
20 of that work of art--which is normally a form of a photo-
21 graph or a transparency--and work from that on the screen.

22 Very often there is a rental fee, or usually
23 there would be a rental fee paid to a library, museum,
24 publisher for the right to rent the transparency itself.
25 That is not a fee for the reproduction or the display of

1 that work, simply for the rental of the physical reproduction
2 in the form of a photograph or transparency. These
3 rentals do not and should not include display rights.

4 I'd like to note parenthetically that VAGA is
5 currently negotiating with major museums in the United
6 States to assure that the rental transparencies and negatives
7 does not carry with it the grant of reproduction rights.
8 What some of these museums are now doing is when they
9 rent a transparency or a photograph they say either
10 "this does not carry with it the right to reproduce
11 this work, for that you -- for that, you must go to a
12 proprietor or a licensing agency, such as VAGA or to an
13 artist, or what have you.

14 That is what we are negotiating with museums,
15 what some museums now do voluntarily, and what many other
16 elements of the communications industry do voluntarily.
17 They separate the sale--or the rental from the rights.

18 Yes, ma'am?

19 COMMISSIONER BURG: Why would they rent the
20 transparency in the first place?

21 MR. BRESSLER: Because they have gone through
22 the trouble of getting that transparency or photograph
23 made. And that is a source of income for them, to rent it
24 out. And they get it back, I assume, if not, they charge
25 an additional fee. It's a source of income to rent out

1 transparency that they would have. So, I urge upon you
2 that that's one fee, one standard that you not consider
3 because it is irrelevant. The fact that it might be done
4 in television does not mean that it should get the
5 imprimatur of this Tribunal because it's wrong--it's
6 wrong. And it's acknowledge by many elements of the
7 communication industry to be wrong.

8 (4) Reporting of uses should be calculated to
9 enable artists to collect their fees.

10 VAGA is prepared to submit to Public Broadcasting
11 and to the local stations a continuously updated list of
12 its artists by name and address. We assume that other
13 organization are prepared to do the same. And I gather
14 from this submission that other organization are prepared
15 to do the same.

16 It is then simply procedure for Public Broadcasting
17 entities to submit statements and fees to the artists
18 directly, with VAGA receiving a copy of the statement. No
19 administrative fees whatsoever is involved to the artist.
20 For payments due to members of VAGA's European affiliates,
21 funds and statements could be remitted to VAGA for trans-
22 mittal to the affiliates, who in turn, will pay their
23 members. These transmittals will be pursuant to agreement
24 between VAGA and its affiliates.

25 I might mention at this point, and I think it's

1 clear, I mean there's no question, that European artists
2 are entitled to the same rights under Section 118 as
3 American artists, not exactly the same standard.

4 Public Broadcasting should have the obligation
5 of identifying works distributed by it, or used by local
6 stations by the name of the artists. If artist is a
7 member of an association who has supplied its membership
8 list to the user, the task is easy. If the artist is not
9 a member of such group, standard reference works, such
10 as "Who's Who in American Art" can be helpful. If these
11 tools still do not give the address of the artist, then
12 arts organizations, such as VAGA, can undertake to
13 assist PBS in locating the artist.

14 Only after all reasonable steps are taken to
15 identify and find the artist should Public Broadcasting
16 be permitted to have the funds allocated for such use
17 returned to its treasury. Simply stated, the burden should
18 not be on the artist or his representative to determine that
19 a work has been displayed. Rather, it is on Public
20 Broadcasting entities to locate the artist and pay him or
21 her.

22 It is suggested that if the artist is not
23 ultimately found and paid, the funds be returned to
24 Public Broadcasting for the specified purposes of commission-
25 ing new works of visual art.

1 In conclusion, as I said before, negotiations
2 to enter into a voluntary agreement were conducted and
3 have been, and are being conducted by representatives of
4 Public Broadcasting and VAGA. These negotiations, while
5 somewhat frenzied, were, we believe, conducted in good
6 faith, and I believe they still are. Unfortunately,
7 they have failed. We are thus placed in the posture of
8 dealing with the proposed Public Broadcasting license that
9 is before the Tribunal.

10 In summary, It is our view that this license
11 is totally unsatisfactory. It goes beyond the breadth
12 and intent of the statute, and places the visual artist
13 in a position akin to a "widget supplier". The visual
14 artist, like Public Broadcasting, has something positive
15 to add to our culture. The relationship of this forced
16 marriage should take recognition of this fact.

17 Thank you very much.

18 CHAIRMAN BRENNAN: Thank you, Mr. Bressler.
19 You asked us to adopt rates which are similar to those
20 which were paid in the past. And you give us a few
21 examples of what these rates have been. But only a few
22 examples.

23 How can this body follow your recommendation to
24 adopt rates similar to those paid in the past, if we are
25 not acquainted with what these rates have been?

1 MR. BRESSLER: Mr. Chairman, I think that you
2 hit the horns of a dilemma that exists for those over
3 here, and I believe over there as well--as well as it does
4 for the panel. We have anecdotal rates, little things
5 here and there. It is extremely difficult to have
6 examples of what is going on abroad in a comparable
7 situation.

8 I must beg an avoidance of your question because
9 I just cannot answer it beyond that. Perhaps if a
10 commission were funded to go in depth into rates that were
11 paid by commercial television and non-commercial television
12 over a period of years, perhaps then the Tribunal and us
13 will have more insight into that.

14 Mr. Aleinikoff has told me on numerous occasions
15 that there just is not such information available. I gave
16 you samples from my own personal practice and from VAGA's
17 experience. I can't do anything more at this point.

18 CHAIRMAN BRENNAN: Has your position on the
19 Droit de Suite issue--it's not relevant to this proceeding
20 but since you are here, I'll ask you the question.

21 MR. BRESSLER: We believe that as our mandate,
22 as representatives of foreign organizations, that those
23 states which have enacted the Droit de Suite, that we have
24 an obligation on behalf of our foreign societies to
25 collect the Droit de Suite if, as and when they become

1 enforceable. With regard to American artists and
2 galleries, after checking with members, both artists and
3 galleries, we have determined that this is going to be
4 the determination of the membership itself. When it
5 becomes a federal law, we will certainly then be in a
6 position to enforce. Until such time, Droit de Suite,
7 for the American artist will not be collected by VAGA.

8 CHAIRMAN BRENNAN: Thank you. Are there any
9 questions from the Commissioners? Commissioner Coulter.

10 EXAMINATION BY COMMISSIONERS:

11 BY COMMISSIONER COULTER:

12 Q Sir, what is the frequently with which pictorial
13 works, and works that we're discussing here, occur on
14 Public Broadcasting?

15 A Again, I hate to have come down to Washington
16 to tell you the type of answer that I gave to the Chairman.
17 I don't know. Mr. Aleinikoff says he doesn't know either.
18 He suspects that it is infrequent. I don't know.

19 I do believe this though--this is merely
20 inferential, and there's no reason to believe that I'm
21 right or wrong other than there's an inference--I believe
22 that local stations on local usage would be more inclined
23 to show works if visual art that a PBS distributed program
24 because it would be relatively inexpensive for them to
25 simply have transparencies or photographs, or go to a

1 museum and get transparencies or photographs and put them
2 on the screen for some sort of educational program.

3 That is a mere inference. I think it makes
4 sense that that would be the case. But as far as the
5 frequency of visual arts, I just do not know. I'm sorry.

6 Q It's something that would be relatively easy
7 easy to find out, though. Take a sample of a week or
8 something like that, and say look how many times--

9 A Yes. There was some discussion between
10 Mr. Aleinikoff and myself--I think it was the first time we'd
11 met, and this much I will reveal, he bought me lunch--that
12 we jointly finance a project to monitor and do some
13 sampling. We were in no position to help in that financing
14 but I think it's a good idea.

15 CHAIRMAN BRENNAN: Commissioner Burg?

16 BY COMMISSIONER BURG:

17 Q Mr. Bressler, I'd like to get back to the
18 question that the Chairman initiated, and that concerns
19 your statement that the rates that are determined by this
20 Tribunal should be comparable to what might have been
21 charged in the past.

22 Well, if you can give us no examples of what
23 has been charged in the past, why did you include that
24 statement? Surely there must be some kind of a yardstick
25 or benchmark, even if the record isn't copious, there must

1 be something.

2 A Those benchmarks--I think there are examples.
3 There are examples that I've given; there are examples that
4 have been given in the submission by the Coalition. They're
5 not enough to qualify as industry standards. 14 years ago
6 we charged \$50 per use. The French are getting \$50 for
7 one-time showing. Those are benchmarks for a one-time
8 showing.

9 What's been proposed is \$25 for as many times as
10 they wish to use it for a five-year period. Now, as
11 between the two, I would think that something that has
12 occurred, which is what the French are doing, is \$50
13 each on the first time it's used, and then a smaller
14 amount on a residual use. That is a specific example. I
15 would not have it rise to the dignity, however, of being
16 an industry practice. First of all, that is in France;
17 that is not here. Perhaps they consider these works
18 different than we do. So, I wouldn't say that it is
19 industry standard.

20 By the same token, the stock-photo houses
21 have charged rates, examples of which you will find here.
22 Those are benchmarks; they're not guidelines. They're
23 sort of like little clues that we have. All we have is
24 clues. We have no clues as to how much usage there is.
25 We have only clues as to what the fees might be, and what

1 the Royalty Tribunal should be consider to be reasonable
2 as required under 118.

3 Q What's the residual fee in France?

4 A I believe it's one-half of the fee on the second
5 time, and then it goes down to the third and fourth and
6 fifth--like that.

7 Q On the bottom of page 8 and on page 9, you
8 submitted that some 14 years ago, on behalf of a client,
9 you granted the right to display four of the client's
10 works of art for public television. And it cost \$50
11 per illustration.

12 Then you said, "If the license were granted
13 today, the fee would be at least double or triple that
14 figure". On what do you base that assumption?

15 A Because I wouldn't have granted it for less.

16 Q So, it's just an arbitrary decision on your
17 part?

18 A Well, no. I know what this particular artist's
19 works were--the fees I was getting 14 years ago for the
20 reproduction of this artist's work. And with inflation
21 and with increase of his reputation, I would say that it is
22 worth now two or three times what it was worth 14 years
23 ago.

24 Q Then indeed, there are some clues, as you say,
25 that you could provide this Tribunal in addition to what

1 you've already provided in the statement to give us some
2 parameters on this?

3 A I could try and go beyond what are in the
4 exhibits and what the Coalition has provided. I don't know
5 where I could really find anymore information. I suspect
6 that others -- I could certainly try. But the best I could
7 do now is to provide clues as to what has happened.

8 Q Could you contact some of the people who you
9 represent and ask them what they sell a photograph or
10 visual display to, say, commercial broadcasting?

11 A I have made some efforts in that direction. But
12 it has not been that frequent. It hasn't happened that
13 often. I have made efforts and I included some of that
14 material here, like the examples that I gave you.

15 Q Well, I think--speaking for myself--any and
16 all of those examples that you could submit to this Tribunal
17 without going through extraordinary work would be very
18 helpful to us, because we would literally be pulling
19 figures out of the air without that kind of--

20 A I understand from the Chairman that we have
21 until Monday--

22 CHAIRMAN BRENNAN: The Monday following the
23 15th.

24 MR. BRESSLER: Monday following the 15th for
25 our final submission. I would surely hope to supply a

1 few more examples of fees by that time.

2 COMMISSIONER BURG: Thank you.

3 CHAIRMAN BRENNAN: Commissioner James?

4 COMMISSIONER JAMES: No.

5 CHAIRMAN BRENNAN: Commissioner Garcia?

6 BY COMMISSIONER GARCIA:

7 Q Your answer to Commissioner Burg just now was
8 to provide us with additional clues or guidelines?

9 A I am going to try to obtain additional
10 information.

11 Q Excuse me. What is the purpose of Exhibit F?

12 A Exhibit F was inserted for a number of purposes.
13 One, to show that a local television station will in, and
14 of itself, negotiate a right. Number two, a local
15 non-commercial television station will negotiate a right
16 only for U.S. use. In the proposed license, they seek
17 foreign use as well. And when this station first contacted
18 VAGA, they sought foreign distribution. And we said, "We
19 cannot grant it". Then they said, "Okay, we will get only
20 U.S. rights".

21 So, it was put in there for two purposes,
22 ma'am, (1) to show that a local station, in and of itself,
23 before it goes and prepares a program, will obtain the
24 rights, will seek rights; (2) does not have to have foreign
25 distribution. Those are the two purposes that that's in

1 there -- not necessarily for the fee because it is
2 somewhat different. It is a one-minute or two-minute
3 piece of film by Leger, the artist.

4 CHAIRMAN BRENNAN: Thank you.

5 Are there any questions from the Public
6 Broadcasting counsel?

7 MR. SMITH: No.

8 CHAIRMAN BRENNAN: Thank you, Mr. Bressler.
9 But you may remain to question Mr. Aleinikoff and
10 Mr. Smith if you so desire.

11 Mr. Aleinikoff?

12 MR. SMITH: Let me start. I'm sure you've
13 noticed that Mr. Latman and Mr. Bluestein are not here.
14 They want me to tell you that they noticed very recently--
15 they've discovered very recently that they had in the
16 firms stable of clients one or two clients who were
17 involved in this area. And told us that they would feel
18 much more comfortable if they did not appear today in
19 the area of visual work because of a possibility of
20 conflict of interest. So, I will be acting as counsel;
21 and Mr. Aleinikoff will speak first.

22 CHAIRMAN BRENNAN: Very good. Mr. Aleinikoff?

23 MR. ALEINIKOFF: I'm not sure whether or not
24 I appreciate Mr. Bressler's adjective, "adroit", or his
25 adverb--I'm not even sure which one of those it is. I think

1 it was meant as a compliment; I'll take it that way. But
2 I would say that I feel that we've been persistent and
3 industrious in this area. From the first minute that
4 Section 118 was enacted, we felt it was terribly important
5 for us to get together with the people who create, distribute
6 and represent visual arts. And we've tried for over a
7 year now to do exactly that.

8 We went through about a six-month period where we
9 couldn't find any organization or individual to even talk
10 to. We made as many attempts as we could. And thereafter,
11 we have met, sporatically, with alliances of organizations
12 which were really intended as other kinds of membership
13 organizations.

14 And we have done our best to make those meetings
15 as frequent and as often as possible. And we have not
16 really been able to do anything along those lines until
17 the last couple of months. Now, we have been in constant
18 negotiations with groups of agencies, with agencies with
19 various kinds of people. We have not been successful in
20 arriving at any kind of agreements. We certainly have
21 narrowed our discussions so we know where our differences
22 are.

23 I continue to be optimistic. I think that
24 we're going to work something out, perhaps under the time
25 constraints, in the next couple of weeks we'll have

1 something that will give some guidance to the Tribunal,
2 if not act as a voluntary agreement that would take
3 effect, depending on the Tribunal's decision.

4 But I think that the Tribunal has to enter
5 this whole area with a great deal of trepidation -- not
6 only because there are very few guidelines -- but also
7 because of the varying kinds of works, and the tremendous
8 diversity of what we're talking about, and the complete
9 lack of organization in this field.

10 Compared to visual works, music industry is
11 a well-organized industry on a commercial basis. And
12 there may be from five to ten basic organizations, but
13 it's handled with those organizations. In this field,
14 there are not only numerable organizations, but there are
15 also thousands of people, especially now, of artists who
16 are not allied with any organization. And they're across
17 the country--just isn't New York or California--they're
18 all across the country.

19 And I think that the first thing we have to
20 realize is that under the Copyright Act that exist today,
21 effective January 1, 1978, any visual work that is created
22 is protected by copyright from the time it is created.
23 And that means that not only any art pieces in the newspaper,
24 advertisement or painted by somebody in his own house, or
25 drawn in a meeting or anything else -- all of that is

1 protected by copyright. A snapshot done by any person
2 of his family, of himself is protected by copyright. They
3 are subject to Section 118. And that goes for the
4 highest art kind of a photograph or a Picasso painting,
5 and it goes for an amateur's painting in his home, or the
6 ordinary picture that the child could take with one of
7 those new kind of instantaneous cameras. And that
8 makes an awful lot of difference.

9 In addition to that, I would like to point
10 out that we've been dealing with some 10 or 12 agencies
11 constantly. There are basically, we feel, four kinds of
12 works involved: there are the photographs; there are
13 paintings and fine art; there are illustrations and
14 graphics, book illustrations; and there are cartoons.

15 On the painting side, there is Mr. Bressler's
16 organization, VAGA; there is also a couple of other
17 organizations called--and I can't ever get them all
18 straight easily, so let me look at my notes--The Artists
19 Equity Association and the Foundation for the Community of
20 Artists. They represent, let's say, 30 to 50 percent of
21 the well-known, fine artists in America. I don't know if
22 they represent sculptures; I don't know if they
23 represent other kinds of people besides painters. But I
24 assume that they represent the kind of people whose works
25 would appear in galleries in New York and across the

1 country.

2 On the illustrators, there are at least two
3 organizations. One is the Graphics Artists Guild, the
4 other is the Illustrators' Society. There's an overlap
5 between them, but not a complete overlap between them. And
6 they have different kinds of perspectives and different
7 kinds of functions.

8 On the cartoonist side, there is a Cartoonist
9 Guild, there's the National Cartoonist Society and
10 there's the Association of American Editorial Cartoons.
11 And they all deal a little bit differently from each other.
12 Finally, the only place where we seem to have, so far, had
13 only one organization, it was something called the Society
14 of Photographers in Communications, the initials of
15 which are A.S.M.P. because originally it was known as
16 the American Society of Magazine Photographers and they
17 kept the initials and not the name.

18 They represent many photographers, but certainly
19 not all of the commercial or even professional photographers
20 across the country. Now, originally several of these
21 organizations got together to negotiate with us. And
22 we sat through two or three meetings, explained our problem
23 and hoped that they would get together, and hoped that
24 they would help us in reaching some way to handle the
25 clearance problem that gave rise to 118, which is how the

1 200 or more stations, 250 stations producing local,
2 regional and national programs use photographs, fine arts
3 and other pictorial works, and pay for them for their
4 programming and broadcasting purposes.

5 Now, the reason why an awful lot of past
6 history goes by the boards and why there is no precedent
7 is that for many, many years they have not been paid for it.
8 First of all, there was an extreme doubt under the old
9 Copyright Law whether the display in broadcasting is
10 copyright, copyright law as they need for payment.

11 Second of all, all of the stations felt that
12 it was either fair use in most cases, or there was
13 some other good reason, so there's been no payment up
14 to now. And indeed, one of our purposes of Section 118--
15 when we endorsed it, when we asked for it--was to make
16 sure that artists and fine artists and photographers
17 get some payment from Public Broadcasting. We're
18 encouraging that. And we've encouraged the organizations
19 to get together and discuss with us.

20 And indeed, I've encouraged them personally to
21 come down and appear before you, and to file statements
22 before you, because I think it's important for all of us
23 to get together and try to work this out. This isn't just
24 a monetary bargain, this is an attempt to find a proper
25 clearance mechanism that would make sense easily for

1 whatever it's used.

2 Now, where do we go from here in terms of
3 working it out with these organizations or helping the
4 Tribunal. I have to first indicate a bunch of other
5 problems that we've had in this whole field. Let's take
6 the kinds of works that are involved. Each organization
7 represents different kinds of works that have completely
8 different kinds of aspects to it -- cartoons for example.

9 There seem to be three basic kinds of cartoonists.
10 There are the political and editorial cartoonists, these
11 are the people who make cartoons that appear in the
12 newspapers or news magazines. There are the humor
13 cartoonists who are those that draw New Yorker cartoons
14 and other cartoons that appear in magazines or even books.
15 And finally there are the comic strip cartoonists, who
16 are probably the best-known branch of the whole segment in
17 the industry. This includes Peanuts and Pogo and
18 Beetle Bailey and all those other cartoonists. And their
19 work is probably more valuable, has been sold exclusively
20 to the network for cartoon serials or cartoon programs.
21 And it is tremendously rich in terms of money potential,
22 not only in terms of their cartoons, but also the
23 merchandising rights and all the other things that go with
24 it.

25 Those three different kinds of cartoonists,

1 themselves and their product are different. They all
2 have different possibilities, and probably different
3 monetary evaluations. And yet, they are all very important.
4 The cartoonists feel that they probably have the most
5 valuable property of all of the graphic artists, simply
6 because it is so popular and so well-known.

7 Let's take the paintings that Mr. Bressler
8 was talking about and the museum slides that go with
9 them. He has the Picasso painting, was originally
10 painted by Picasso is probably owned by a museum, if it's
11 hanging in a museum. It may be on loan from an individual.
12 When somebody in Public Broadcasting wants to use that
13 painting, very rarely is anybody able to, or want to go
14 in with a camera and take a picture of the painting.

15 What you do is look in an art book for a
16 print of the painting, or you go to the museum and you
17 ask for a slide. Now, the painting is owned, and let's
18 say, the copyright is owned by whoever the owner of
19 the painting is. But there's a difference. At this
20 stage, it may very well be that the artist contains his
21 copyright, if he hasn't assigned it away, insofar as uses
22 of the painting beyond display-it-on-the-wall concern.

23 If you want to use a painting on a calendar,
24 certainly in New York, and California under common law,
25 certainly in other places as well, the artist retains the

1 reproduction rights. And you have to buy the right to
2 put it on your calendar, or any other print purpose you
3 want, from the artist. Okay. So you have to get that
4 right.

5 You may have to get the right to use the
6 painting itself from whoever owns the painting. But
7 finally, in the museum, when the museum makes the slide,
8 that slide has its own copyright protection on it. A
9 slide is a copy of a work of art, which is protectable
10 as a new copyrighted work under the statute.

11 Therefore, for us to use that for public
12 television purpose, you'd probably have to get clearance
13 for the slide beyond, or included in the rental price.
14 You pay the \$10 or \$15 for the slide and for its use on
15 television. You also may very well, now, have to get
16 permission from the owner of the copyright, which is
17 either the artist or whoever the artist has assigned that
18 right to. So, that it may very well be that we're in
19 for double payment on these terms. And it may very well
20 be that museums will increase their price for the size
21 or even waive it--we're not quite sure.

22 Up until now, we've only paid for the museum
23 slide and copyright on the slide because we have felt there
24 is no need under the Copyright Law to pay for the initial
25 and the original work itself. Mr. Bressler is certainly

1 asking the artists he represents to pay for those rights
2 either in place of, or in addition to the museum. I'm
3 not quite sure.

4 On book illustrations and graphics we have a dif-
5 ferent kind of a problem. The illustrator is one kind
6 of a person and does the kind of a work that is distinct.
7 You've all seen pictures in books, and so have we. But
8 the graphic artist do design work; they do cover designs.
9 They do other things of that kind which are not the
10 same as illustrations but; nevertheless, it's still
11 protected by copyright and may show up on a program sometime.

12 Now, those two things have a completely
13 different monetary value. And I think it could be
14 illustrated. Finally, you get to photographs. And all of
15 you know that there is--not only the snapshot and the
16 professional photograph--but there is the advertising
17 photographer, the advertising people who are very well
18 known in fashion photography. There's the standard
19 commercial photographer who will take a picture of a
20 building for a real estate development.

21 There are all kinds of art photographers,
22 there's a high art, there's a fine art, and a art magazine
23 on photography. There are all kinds of pictures. And
24 there are pictures that are in the public domain before
25 February 1, '78, millions of pictures in the public domain--

1 so much so that we don't even know whether they are
2 protected and whether they are not. Which brings me to
3 the copyright question basically as it is.

4 On pre-1978 works of art, there are serious
5 questions of copyright protection. On paintings, for
6 example, there is a serious slang of cases in Copyright
7 Law where there's been consideration whether or not the
8 hanging of a painting in a museum, per se, puts it into
9 the public domain so that anybody can make a copy of it.

10 There's the standard that has been set under
11 which said that if the museum itself restricts the right
12 of public to come in and make pictures of its pictures,
13 then perhaps the copyright protection still carries on.
14 But if it gives a free right to the public to come in and
15 make reproductions of its pictures by painting or something
16 like that, it could very well be in the public domain.

17 That's the first line. And that's a serious
18 question. Nobody is really very sure whether they're in
19 the public domain or not. And it's something that we had
20 to deal with, and hope that we could get an arbitrary
21 reduction on that, a year date or something like that, so
22 we wouldn't have to worry about that--unless there was a
23 photograph, a copyright notice someplace on the photograph,
24 or indication that it was copyright, and if the photograph
25 was either sealed or published in some other way and it

1 fell into the public domain.

2 You'll find, for example, what people are
3 interested in are these old publicity photographs for
4 old movies. I think most of those are probably in the
5 public domain because they are reprinted as publicity
6 photos. And when a motion picture says, "You can't
7 use our posters from Casa Blanca", they are probably not
8 able to prevent you from using it because it's in the
9 public domain. And that's true of an awful lot of photo-
10 graphs.

11 The ones that you find were probably with a
12 copyright on the back which protected the photograph.
13 And that's on all photograph prior to 1978, of which
14 most obviously are up to this time, and which you people
15 must set rates for.

16 On illustrations and cartoons is another problem
17 and that is the problem of lost copyright. Does the artist
18 of the book own the copyright. Has the cartoonist granted
19 the right of the carton to the magazine in which it first
20 appears. There is a strange body of the law in copyright
21 pre-1978. If a cartoon was used in a magazine, the copy-
22 right of the magazine would not necessarily protect the
23 cartoon unless the artist has assigned all rights of the
24 magazine, notions of indivisibility of the copyright.

25 There have been a series of cases. Dr. Seuss

1 lost all of his rights and some of his cartoons have
2 appeared in Liberty magazine in one of the most recent
3 New York cases. So, it's possible that those are in the
4 public domain. All of these kinds of problems that the
5 1978 law has cured to a great extent for anything created
6 after that because all of it is now subject to copyright.

7 Our only problem with that one is how do you
8 find out who owns the copyright, whose got the agency
9 for the copyright. We can take Mr. Bressler's word that
10 he represents the people who he said he represents. But
11 what do you do with all those people who nobody says they
12 represent.

13 Now, how do you find them and what do you do
14 about them. This was one of our most practical problems
15 which we try to face in our license, as you will hear
16 later from Mr. Smith. Now, as far as our own usage is
17 concerned, we have the problem again of all of the various
18 kinds of public broadcasting usage.

19 There are local programs, state, national,
20 regional programs. They have different degrees of visibi-
21 lity. We know, as we've told you, in the music field, that
22 we can probably police national programs through PBS.
23 We can ask producers of national programs to give us a
24 statement of what kind of pictures appear in each program,
25 and attempt to find out who those people are, who owns

1 it either directly or indirectly through advertising.
2 We can do that. Even then, I'm sure we'll get some
3 description of a boy on a horse on a photograph, and not
4 know where it came from because the producer picked it
5 up out of some place and can't tell us anymore about
6 where it came from. But we feel we can take the best
7 possible step on those.

8 We do not feel that we can do that for local
9 uses. Again, it's too expensive, every station would have
10 to keep track and keep a police check of every program,
11 even if only two or three photographs shows up a week, or
12 even if one painting shows up a year. That kind of
13 policing would be terribly difficult for programs which
14 are shown to a limited audience for a limited amount of
15 time.

16 We had prefer to find a different way of
17 handling that other than individual payment and recording.
18 And we think we have programs come up with something like
19 that. We also have problem in assessing prices on uses.
20 There's one thing if you show a whole photograph and
21 concentrate on the photograph and use it as illustration.
22 It's another thing when you use series of 30 illustrations
23 or 30 photographs in a montage, each one taking up one
24 section.

25 If you have a dramatic scene on the play and have

1 a picture on the wall. It's another thing to take a
2 picture or cartoon and use it behind a title. All of those
3 are different kinds of uses with different characteristics
4 and perhaps different values. But which they are minimum
5 in terms of overall payment, which don't know what uses
6 have been made.

7 We have not been able to make the same kind of
8 a study as we did on music. We have not been able to do it,
9 nobody else has been able to do it either. We probably
10 should have five people in five cities and watching all
11 the programs on public television over the course of a
12 week and give us some idea what they come up with. Maybe
13 it takes longer than a week. But we can at least get
14 examples. And maybe we can do it in the next year or so,
15 maybe we could make a try at getting that.

16 I do feel that the amount of use of the fine
17 artists, the expert painter, the professional painter is
18 probably very, very small. I think the use of the
19 photograph is probably quite large where illustrations are,
20 I don't know. On the other hand, we have done at least
21 one national program of an art exhibition of the country
22 that had over 300 paintings in it. Whether it's an
23 Egyptian exhibition that is not a copyright, or a french
24 impressionist exhibition that suddenly tours the country,
25 we would be in fees of \$50 or \$25, whatever fee you want

1 to call it for those pictures, that fee multiplied by
2 two or three hundred is quite a bit to pay in terms of
3 a program of that kind.

4 So, we have the different kinds of uses, the
5 different kinds of pictures, the different kinds of
6 programs. We also need different kinds of materials
7 obviously. Well, I didn't think film clips were involved
8 in this. But this is really limited to non-dramatic,
9 skilled photos and paintings. Therefore, we did not
10 consider film clips or indicative of what kind of rate
11 should be used.

12 But nevertheless, there are the different kinds
13 of materials that are needed. You go to the museum
14 because you want the museum print, or go to an art book
15 because you want that print. You go to the illustration
16 to get the physical thing that gets you a copy of it.
17 Usually when you go to a photograph house, you want a
18 photograph and you want a good print, and you pay for the
19 print in addition to the royalty and the right. Sometimes
20 you can't tell where one begins and one ends.

21 And finally, there are the rights. Yes, we
22 still do need those same rights that we've talked about
23 before. We need long term rights, five or six-year rights.
24 If there is one piece of art work in the program, you
25 probably won't use the art work. We don't want all of

1 programming restricted in audience or use simply because
2 it's got to be some element, and a very small element
3 that has restrictive rights to it. We still do want those
4 audio-visual rights because most of the programs do go
5 to the schools. It's not much to ask the artist whether
6 it's a photograph or fine art to be used by the school,
7 like to make it available. We'd like to have a way to do
8 that. So, that we're in a place where we need the
9 extended rights for the Public Broadcasting, that we
10 also felt we had to insist on if it was going to be
11 used for something useful to the American public.

12 All of these things we've been negotiating
13 because it's so complicated, the negotiations have been
14 long and hard. We started to negotiations with an
15 alliance of the Coalition of the Visual Artists organization,
16 COVA. We didn't get very far with them. I think in our
17 own mind, because they had a lot of difficulty of reading
18 between themselves of what each of them thought.

19 When we found out we couldn't get very far,
20 after, I guess, three of the negotiations, asked if we could
21 negotiate separately--we attempted that too. They have
22 different kinds of problems and different kinds of
23 requests, so that each of our negotiations have seemed
24 to completely different. The last movement, which is a
25 little bit helpful, each of the organizations and each of

1 of the fields seem to be getting together.

2 Mr. Bressler has gotten together just yesterday
3 with two other fine art negotiations to talk with us
4 together. I had lunch -- was bought lunch by the Illustra-
5 tors' Association with the Illustrators' Society and
6 Graphic Artists at the same time, and hope that maybe--
7 the cartoonists also seem to all be together somewhere--
8 maybe we can deal with each of these groups of
9 organizations in their respective fields. We do need a
10 little more time to do it. Dealing with this number of
11 organizations, the amount of time in a day goes twice as
12 fast, even if you eat lunch while negotiating. We're not
13 quite up to breakfast and dinner yet.

14 But just on the data on use--no, we don't have
15 any data on use. We'd like to develop it. That is why
16 we have no objection to the first five year period being
17 thought of as a time where you set a tentative rate, with
18 the understanding that we will get more knowledge as we
19 go along. We don't need to consult any artists. We don't
20 have much sympathy with photographers who would like to
21 set the rate so high so we won't use their rates because
22 they feel we should not be using their works.

23 Most photographers would like to be commissioned
24 to photograph something for us. So, they'd like to take
25 their work out simply by having the rate set so high that

1 nobody would want to use it. We don't want to go that
2 route. We want to compensate people actually and perhaps
3 reasonably and fairly for their works. We do have some
4 sort of indication on prices which I'd like to give you
5 now, as a rule of thumb. But which I am hopeful we'll
6 be able to implement with some more information during the
7 next week before we submit something in writing.

8 The initial survey which we tried to carry out
9 about three weeks ago--so busy in negotiations, we have
10 not been trying to find the time to do something more
11 about it. But we certainly intend to now. There are many
12 photographs that have been made available free, by choice
13 of the people who own the photographs or have control or
14 possession of the photographs in their file.

15 There are many photographs that have been used
16 for free by stations simply because they have never asked
17 anybody for permission and never asked any payment.
18 Whether it's because they feel it is unfair use or whether
19 they feel the photograph are not protected by copyright, or
20 whether they feel they don't have to do it under the
21 statute, or didn't have to do it. So, there are many
22 photographs used without charge or payment.

23 There are a large number of those photographs
24 that are paid for within a \$5 to \$25 per photograph limit.
25 These are the museum prints that we've talked about,

1 the museum slide, they're in archives, historical and
2 other kinds of archives, society's photographs, historical
3 societies and other agencies, and finally, the individual
4 photographer. It seems that individual photographers
5 will make their past pictures in their files available
6 for up to \$25 if it's a top plight photographer in
7 New York.

8 You don't expect the top fashion photographer
9 to make it available, but there are large number of
10 photographers who would be very pleased to have you use
11 their photograph up to \$25. In the \$25 to \$50 category
12 are the photo agencies, like news agencies like UPI,
13 AP, and also the so-called stock photograph, Betman (ph)
14 is one. There may be some others, I just don't remember
15 their names. They seem to come out some place in the
16 \$25 to \$50 category. Most of the times, including the
17 print of the photograph that they are permitting you
18 to use.

19 Above \$50, there are special kinds of artists
20 for special kinds of work. Between \$50 and \$75, there
21 may be some special photographers that people think are
22 more valuable than the ordinary photograph. There may
23 even be some other kinds of works like illustrations,
24 certainly sounds to me, from what the cartoonists say,
25 would be above \$50 and up to \$75. When you get to about

1 \$75, you don't find any of our stations buying. The
2 most work we seem to have when you get above \$75, you
3 either get a photographer to take a picture for you, or
4 you find out if it's in the public domain or substitute
5 it for something else. But it's not worth it to the
6 producer to pay over \$75 under any circumstances--except
7 one. And this is the kind of case where we've found with
8 a program or film that has been made that include a
9 picture. The person whose picture it is sees the picture
10 and says, "That's my copyrighted picture. You'd better
11 cease and desist or else I'll get an injunction or sue--"
12 or whatever.

13 And it's at that stage that the producer
14 says that it's a hell of a lot more worth while to pay
15 for the picture than have to pay for the film to be done
16 over without the picture. I don't consider that blackmail.
17 I consider that to make producers a little more careful
18 about what they use in the future. I think when you
19 get above \$75, and most of the time when you get above
20 \$50, that is the kind of situation it is when there's a
21 special need for something that can only be used that way.

22 And we'll try to give you some more definitive
23 information on that. We can't tell you what Mr. Bressler
24 would have charged for his clients or would in the future
25 charge. But we can tell you what the stations say they

1 would be willing to pay or have paid up to now.

2 MR. SMITH: With that background, I'd like to go
3 through a license that we have now proposed. And I think--

4 CHAIRMAN BRENNAN: Mr. Smith, we will recess
5 for five minutes.

6 (A short recess was taken.)

7 CHAIRMAN BRENNAN: This hearing will resume.
8 Mr. Smith.

9 MR. SMITH: As you may have noticed already,
10 what we did try to do in drafting a proposed license for
11 you was to take two things into account. One, the kind
12 of arrangements that we made in the music business that
13 seem to be applicable in this area as well. But also,
14 importantly, as Mr. Aleinikoff has talked about, there
15 are distinctions between the two kinds of works, and we
16 try to take those into account as well.

17 The first thing about the proposal is that it
18 covers all the rights specified in Section 118. Second
19 thing is that if the license, be it in either this form
20 as a voluntary, which is drafted in the form of a
21 voluntary agreement. And Commissioner Garcia, in our
22 music hearings, talked about statutory license as well. But
23 it's transferrable.

24 It covers all public television programs,
25 national, regional, state and local. It covers all

1 stations and all entities of what are in the statute
2 called Public Television Entities, are non-profit
3 institutions, such as PBS, which is an entity within
4 Section 118, CPB, the regional networks who are not
5 stations. It covers them as producers. Gives them the
6 right to take the material and incorporate it in a program
7 and stations who are broadcasting those programs.

8 The terms is five years. And because, again,
9 we're talking about a voluntary license here, it's
10 renewable. If there are no voluntary arrangements,
11 presumably the Tribunal would come back in five years
12 and look to see if deals have been made that cover the
13 field. And if not, they'd have to fill the gap.

14 The rate is \$25 per use in national programs;
15 and under two seconds for background uses are not paid for.
16 This is really a recognition of difficulty in this area
17 concerning definitions of fair use and incidental use.
18 And like in Harry Fox agreement, that rate is deemed in
19 the license to cover both national and such other
20 uses. And it's the same pattern, in other words.

21 In the reporting area, which is obviously one
22 of the most difficult in recording and accounting area,
23 which is one of the most difficult in this field principally
24 because there are no, at least for purposes here today,
25 where we think we have consumed no voluntary arrangement.

1 There are individual painters, there are individual
2 photographers, many of whom are not part of any group at
3 all. And the identification problem of whose work is
4 whose is just very difficult. And we've tried to provide
5 some mechanism to take care of that.

6 And what we have done is we will ask--if the
7 license provides for it--we will ask every producer of a
8 program that is made available through PBS--and I want
9 to stress that that, again, is about 70 percent of the
10 average schedule of a station will come through us--to
11 prepare in essence what is a cue sheet, picture cue sheet.
12 And the license specifies the kind of information that
13 we think should be placed on that to enable us as well as
14 copyright owners to identify.

15 As Mr. Aleinikoff has spoken about just a
16 minute ago, many photographs for example, it's just
17 impossible to tell whether it's copyright or who owns it.
18 And we will ask our producers to try to describe as speci-
19 fically as they can, where there is no identified creator,
20 if it's from a book or if it's from some other source,
21 there's no copyright notice on it or adjacent to it, we
22 would ask them to describe just as specifically as they
23 could what the photograph is about, or a painting for that
24 matter, although it probably won't be as difficult.

25 Those cue sheets would then be put together by us

1 at PBS and a list made of all works used in the course of
2 a year. And that list would then be made available to
3 anybody who wanted to see it. And obviously, to the
4 extent we know agencies and groups that represent a
5 substantial number of owners, to them as well. And they would
6 then look through it. And obviously if there's a
7 member of that organization or a photographer, fine artist,
8 illustrator finds a work in there described, that he
9 or she believes it is a work that was created by that person,
10 they would contact us, and then some other arrangements
11 would come into play.

12 Obviously, if we know who the creator is at
13 that point, we would pay that person directly whatever the
14 fee would be. We have created in the license, as specified
15 in the House Report Section 118, the House Report speaks
16 about the inability to locate owners and a period of time
17 within which the money would be kept available for an
18 owner to come forward to claim payment. And then after
19 such a period, that amount would no longer be payable.

20 What we have proposed is a creation of a trust
21 account for those amounts where we just do know who to
22 pay to. And that by publication in various places in the
23 country, we would try to notify the creators of the
24 existence of that account and of his works. And those
25 lists would then, as I said before, be made available to

1 anybody who had any interest in looking at them. And
2 we then proceed to see if that work can be identified as
3 owned by that person, and then payment would be made.

4 The license provides that that account, those
5 funds would remain in that account for a three-year period,
6 at which point, if no one has come to get the payment, it
7 would no longer be due and payable. There is a provision
8 in the license for warranties and indemnities from the
9 owner. Obviously this is a difficult and complex problem.

10 If you make a payment under a compulsory
11 license to a person who claims that they're the owner, a
12 licensor, and it turns out that that person doesn't own
13 the work and someone else does, it's been traditional in
14 this business, the person who owns it will protect the
15 user against when the owner said "I'm the owner", but turns
16 out not to be.

17 I thought I might go through some of the
18 points made by COVA in their presentation--

19 CHAIRMAN BRENNAN: Mr. Smith, I should perhaps
20 interrupt. Mr. Green has informed me that he placed
21 that statement in the mails to us. But as on other
22 occasions, it seems we are about the last ones to receive
23 submissions to this agency. And adversaries, people in
24 New York have access to that. We have not yet seen the
25 documents. So, perhaps it might be better to simply make

1 your comments in writing for the record, unless you want
2 to preface it by first explaining or summarizing
3 Coalition's position.

4 MR. SMITH: I thought it might be useful because
5 they have raised objections to various elements of our
6 proposal.

7 CHAIRMAN BRENNAN: Then you'll have to first
8 briefly explain what--

9 MR. SMITH: Many of them are the same as
10 Mr. Bressler has raised, because they have it in a
11 numerical order. And I probably couldn't remember exactly
12 every point that Mr. Bressler stated.

13 CHAIRMAN BRENNAN: Perhaps, Mr. Smith, I
14 should speak a little more loudly. Since we're in the
15 Postal Rate hearing room, maybe the chairman will hear my
16 comment about the mail service.

17 MR. SMITH: Let me just turn to a few of these
18 things. Mr. Green has stated first that his concern about
19 local uses under our proposal. Now, this is obviously a
20 very difficult question for us and for them. And it is
21 difficult as well in the music situation. I want to
22 recall to your attention the arrangements with Harry Fox,
23 wherein, we paid for national uses, and essentially that
24 payment would cover local uses.

25 What we're essentially saying is that those

1 local uses are--. The local programming that we're
2 talking about represents--and state programmings
3 represents about 30 percent of the stations scheduling.
4 And of that 30 percent, as I mentioned--I believe I
5 testified to in music, part of this--a great deal of that
6 programming, perhaps 15 percent is instructional, which
7 also in great part is probably exempt.

8 So, we're talking about, in terms of hours of
9 programming, a minority, small minority of the total
10 programming that is put out by the station. And I would
11 like to say, as well, that even in the music industry,
12 there will always exist uses which are not compensated for.
13 I mean, it's just been historical. Even ASCAP is not
14 able to survey every use and the owners of those works
15 to the extent that they appear, obviously, are not going
16 to be paid.

17 And there's some accomodation for that in the
18 ASCAP formula as well. Well, the same here. We are
19 hoping, and our proposal is that the fee for national uses
20 will cover most of the works used. And it's a fee that
21 to the extent is collectible by agencies representing
22 large groups of owners, to the extent they wish to work
23 out some arrangements among their own members; that's also
24 a possibility. But we know of no other way to do it.

25 Consistent with the administration problem we

1 have, if we had to keep records of payment on every single
2 use by every local station. Mr. Green also raises
3 questions about our proposal in that it provides for
4 unlimited rights. And I believe that our license, in fact,
5 says that we would be prepared, as Mr. Aleinikoff has said,
6 to work out some kind of limitation on the number of years
7 that a work would be used. And we discuss that with everyone.

8 But I think it should be recognized that
9 it's the program itself which determines the use. Most
10 programs aren't used much past three or four years anyway.
11 And whether or not the rights in the photograph is for
12 unlimited use--

13 CHAIRMAN BRENNAN: I seem to recall that we
14 had a discussion in the Congress on the ephemeral recordings.
15 It was suggested that these programs were used for several
16 years more than three or four. Am I mistaken?

17 MR. SMITH: Those are instructional programs.
18 And I'm not really talking about those programs because
19 many of them are exempt. So, they wouldn't fall under
20 this anyway. You're absolutely right, Mr. Chairman,
21 there are some programs that have very long use. But in
22 general most of the programs you see on PBS for example
23 become not useful after a certain limited period of time--
24 three, five years, something like that.

25 And of course, the photograph wouldn't be used

1 after that point in broadcast. Mr. Green, in the COVA
2 proposal, objects to the once a year payment. And he
3 points out that there should payment much more often
4 during the year. Indeed, cites the music examples, as
5 quarterly payments or semi-annual payments.

6 One of our problems is we wanted to provide a
7 system where we could take the full year, compile a list
8 and make it available to people, some kind of coherent
9 list of all the works. And it was our feeling that since
10 we're going year after year after year, there would be a
11 once a year payment. It would be for the prior year, but
12 it's the only way administratively we could work it out,
13 so that we knew exactly how much money we had from
14 everyone, that we had time to collect the money, that we
15 had time to prepare the list. Because for December, for
16 example, it's going to take three or four months to
17 put that altogether to--for programs broadcast in December,
18 which might have these works in them, we're going to
19 need some time to put it all together.

20 Mr. Green does note, and makes a very strong
21 point that COVA does not believe the record keeping and
22 notice provisions are adequate. And we've talked about
23 local and regional already. But he does suggest that the
24 list not be available on request, but be available by us in
25 our own motion, sending it to people.

1 Our problem with that is that we don't know
2 who we're talking about. We'd be happy to send the list
3 to any organization that represents it, but there are a
4 lot of people whose works we are going to be using, who not
5 members of that organization. And if anyone is interested,
6 we would provide that list to anyone to who asks.
7 Essentially what we're saying is we can't deliver more or
8 less on our own notion, because we wouldn't know, except
9 for the four or five or six organizations with whom we
10 are negotiating, who to deliver it to.

11 Mr. Green has made the point that here we're
12 only proposing one fee, single fee. And that in the
13 music industry, for example, there's a fee for performance
14 and a fee for recording. And I think all I want to say
15 about that is that traditionally in business of licensing
16 this kind of work, there's never been a separation of fee
17 for broadcasting recorded performing rights, as far as I
18 know.

19 And a single fee for the right to use a work
20 to be broadcast, in this field, there is no distinguishing
21 characteristics. And in fact, Section 118 doesn't suggest
22 that there has to be a separate fee for the three rights
23 spelled out in Subsection D. It simply says those are the
24 rights that are obtained pursuant to Section 118. And
25 because that would create immense difficulties, a single

1 fee is both traditional and easy to administer. And we
2 feel that that's the way it ought to be.

3 I think those are the key points that he made.
4 There are some minor others, but I think we've touched
5 on most of them.

6 CHAIRMAN BRENNAN: Thank you, Mr. Smith.

7 MR. SMITH: Mr. Aleinikoff would like to add a
8 few words.

9 MR. ALEINIKOFF: I'd just like to say a couple of
10 things in general about the possibility of other license
11 provisions. There have been in our discussions a couple of
12 things which perhaps should be reflected in any kind of
13 regulations that the Tribunal comes up with, or we would
14 not have any objection to, and I think might be useful.

15 The first is not the question of Adroit de
16 Suite, but something called Adroit Moral, which is French--
17 the Americans--the moral rights which go to the changes
18 that are made in a visual work by others besides the
19 artist. There have been problems and questions raised by
20 painters and illustrators about what is done to their work
21 on screen.

22 And we have indicated that we feel nothing
23 should be done to anybody's work for translation onto a
24 television program. And indeed, an author is entitled to
25 that kind of protection. You can use still visual works by

1 animating, which doesn't mean making cartoons, but does
2 mean moving them around on a stand, and moving them around
3 the picture or focusing the camera in different places.
4 That can be done. But it would be wrong to take somebody's
5 illustration or photograph--and it's not just putting a
6 moustache on a picture--but using it in some other way, or
7 changing it in a way that would react against the author.
8 We feel there's nothing wrong with protecting the author
9 on that basis.

10 Even though moral rights are not recognized
11 under the American Copyright Law, we would be under moral
12 obligation not to misuse somebody's work that way. The
13 second thing is the possibility of cutting through the
14 back copyright problem. What is in copyright and what is
15 not.

16 It doesn't help either of us to get into a
17 terrible legal discussion or litigation about whether something
18 is in copyright or not. It would be much better if we
19 could find, if we tried to in our voluntary negotiation,
20 automatic standard of some kind, whether it's the data
21 publication or the data creation or some other kind of
22 thing, which on one side would catch some illustrations or
23 pictures that were not copyright for payment; on the other
24 hand, might very well result in non-payment for copyright
25 uses. But that kind of a basic distinction that would be

1 to apply would be helpful on both sides.

2 CHAIRMAN BRENNAN: How could you enforce that
3 type of distinction, if you're going to exclude someone
4 and the person feels that his work was protected, how
5 can this type of agreement have any legal standing?

6 MR. ALEINIKOFF: I think, Mr. Chairman, that
7 what we were hoping for was that the fees that were paid,
8 based upon a national program, we feel that we've already
9 taken that step when you compare national programs against
10 local programs. So that there is some portion of the
11 fees that are paid, whether they are paid to the individual
12 author or not, be taken as a payment for all copyrighted
13 works that are controlled either by an author or by others.

14 I'm not exactly sure how we can do it. Perhaps
15 we'd better give our mind to it. But it seems to me that
16 if we are willing to include works that are not in
17 copyright, there should be something on the other side,
18 whether it's by waiver of the societies that are involved.
19 Perhaps we could get --

20 CHAIRMAN BRENNAN: I recognize that you're trying
21 to balance on both sides. But the individual person, you
22 can't destroy whatever rights that person has.

23 MR. ALEINIKOFF: It seems to me that this is
24 something the Tribunal should bear in mind. Perhaps there
25 could be a voluntary waiver by the various societies that

1 represent those authors, in return for a rule of this kind.
2 I'm not quite clear how to do it. In the voluntary agree-
3 ment, we can do it with the agency that represents the
4 author. I'm not sure how the Tribunal can do it.

5 Third of all is the non-concentration aspect.
6 In the statute itself, Section 118, it says that we don't
7 have the right under compulsory license to concentrate
8 on a single author's work. We don't intend to, and we
9 would be perfectly willing to have the Tribunal or
10 anybody else spell out exactly what that means in terms of
11 use of one author's work. We don't think that we should be
12 able to take a single photographer's life work and
13 construct the whole program out of that. Section 118 says
14 we ought not to, and we don't want to.

15 On our side, there are two majors. I want to
16 go back to something you asked Mr. Smith about, it is
17 terribly important for those programs that are instructional
18 and don't come within the instructional exemptions in 110
19 to have long term rights. That includes the photographs
20 of the pictures that are used as well. Instructional
21 programs do have a life of 7 to 15 years. And we would
22 think it was unfortunate for those instructional programs
23 not to have those long terms rights, even if they're not
24 essential for other kinds of programs.

25 Indeed, a good deal of our experience, as you

1 will see, is based upon instructional uses of photographs
2 rather than ordinary night-time programs. So, we are
3 concerned with those. And finally, back to the old local
4 business again--we really do not see how we can practically,
5 efficiently and economically administer this on a
6 reporting and payment basis for local programs. It would
7 be a terribly difficult thing for us to do. And we would
8 look for some kind of mechanism.

9 Indeed, in our discussions, we have looked
10 for a different kind of mechanism, whether it's a
11 blanket payment or a payment as part of the per use payment
12 for national programs. There's some way to get away
13 from the reporting a per picture, per program, per station.
14 It would just mean to us a great diffusion of resources
15 that should be better used to make programs or for some
16 other good purpose.

17 Last of all, I'd like to leave with the
18 Tribunal, again, there is a choice here of alternatives.
19 And the choice is between a simplistic approach, which is
20 the approach we took in our license, of just automatically and
21 arbitrarily--automatically, as reasonably setting a price
22 that would cover all kinds of uses, a uniform price,
23 cover all uses, all national programs, all picture, all
24 kinds of material.

25 The other alternative is to get into the

1 differences between material, between societies, between
2 authors, between programs, between uses, between rights.
3 And in which case, we're going to have to set up postal
4 regulations that nobody will be able to follow, and nobody
5 will make use of. Thank you.

6 CHAIRMAN BRENNAN: Are there any questions from
7 Commissioners?

8 (No verbal response.)

9 CHAIRMAN BRENNAN: Mr. Bressler, that gives you
10 an opportunity to ask--

11 MR. BRESSLER: I don't know if it's appropriate,
12 Mr. Chairman, rather than ask a question--because I
13 suspect I know what the answers would be--I'd like to
14 make a few comments.

15 CHAIRMAN BRENNAN: Sure, whatever way you
16 want would meet with our agreement. And by the way,
17 Commissioner Coulter has a question for you.

18 MR. BRESSLER: Until the very last minute, I
19 was somewhat concerned with what Mr. Aleinikoff was doing
20 in telling the Tribunal about the various types of art
21 and photographs, et cetera, that were involved. I think
22 one of the reasons why the visual artists have never
23 been organized the way musicians or authors and composers
24 of music have been organized, is just for that reason.
25 That there has been various gradations of pecking orders

1 and there's been all sorts of fighting, intramural
2 fighting as between the different classifications.

3 VAGA, for example, despite what Mr. Aleinikoff's
4 characterization, happens to be open to everyone who
5 calls himself visual artist. Now, photographers call
6 themselves visual artists. We have a photographer on our
7 board. Sculpture, surely; illustrators, the fact that
8 they may do work for books, they're making residual
9 reproduction rights and display rights.

10 So, it seems to me between the two alternatives
11 that Mr. Aleinikoff stated in the past--I agree with that,
12 that the simplistic approach must be taken, and not
13 any value judgement at all as between the medium and the
14 motivation for its creation, whether an artist created
15 a work to be the modern Mona Lisa, or whether he created
16 some illustrations to be used in a picture book, the
17 residual rights and the rights to display any one of them,
18 it seems, goes across the board.

19 And if Public television chooses to use that
20 work, I think it is reasonable and appropriate, since there
21 is a compulsory license, a standard fee be imposed,
22 regardless of medium and regardless of what the
23 motivation might have been relating to that.

24 One point Mr. Aleinikoff sort of slid in was that
25 historically they've been paying \$5 to \$25 for rental

1 fees. Quote a little different, but that's essentially
2 what it is. And I don't want to repeat what I have
3 mentioned before. But this whole question of what
4 happened to works of art pre-January 1, 1978 is a ball of
5 wax that no one--even Professor Aleinikoff would choose to
6 make a definitive response to. I don't think anyone does.

7 One of the reasons that VAGA is, and some
8 attorneys have in the past, collected monies for works that
9 may or not may not have been in the public domain in the
10 past is because legitimate users just didn't want to have
11 the hassle in deciding whether or not the picture or works
12 were in the public domain.

13 And I suggest to you that the \$5 to \$25 fee
14 for rental is not a guideline. I know I've said it
15 before, but I must reiterate, it is an inappropriate
16 guideline especially for a public television which is
17 under the sanction of Congress, getting a compulsory license.
18 Any inference, any fair inference as to whether a work is
19 or is not protected should go toward it being protected,
20 whether there is a compulsory use in any event by
21 Public Broadcasting.

22 So, I think that \$5 to \$25 fee must be
23 dismissed because there was nobody to police it; it was
24 easy to do it that way. It's not going to be easy to do
25 it in the future because of the compulsory license and

1 because now we do have a policing organization that is
2 going to, at least for our members, look to see where there
3 are uses being made. And we're doing that now. So, I
4 urge the Tribunal that one of the benchmarks not be what
5 they paid for the rental for museum, from museums and
6 books. That's wrong, it's simply wrong. The fact that
7 it was done, doesn't make it right.

8 The third point and the last that I would like
9 to address to something Mr. Smith said, the question of
10 fair use. Mr. Smith said that "in our proposed license
11 we have two seconds or less--well, that's fair use"--the
12 hell it is. This is different 300 words or less; this is
13 different than two lines of a poem or of a songs.

14 A fraction of a second, the whole picture is on
15 the screen. The arbitrary choice of two seconds for
16 fair use is their choice, applies in the face of specific
17 provision of 118 that says that this is not to be added
18 to fair use. Well, I suggest to the Tribunal, the
19 edge is gotten by the compulsory license. It's almost like
20 a criminal statute, it must be strictly interpreted.

21 To say fair use is two seconds or less, as we
22 say it is, is lifting yourself up out of your bootstraps,
23 it's inappropriate. I cannot conceive of a fair use of a
24 visual work of art because it's a whole work of art that's
25 being shown. And that is a residual rights. A portion of

1 it, it may not be in competition, but in a sense it is
2 because that's part of the bundle of rights that the
3 creator has, that is the right to display for a scintilla
4 of time or for any other use, dish towels or what have you,
5 those are the residual rights. Whether it's a second, or
6 two seconds or ten seconds is not the issue. And it seems
7 to me that they must pay for that right regardless of how
8 long it is.

9 Those are the only comments I have.

10 EXAMINATION BY COMMISSIONERS

11 BY COMMISSIONER COULTER:

12 Q Your specific objections to the proposal by
13 Public Broadcasting have only emerged piece meal. What
14 I understand them so far to be is you object to the \$25.
15 You agree on having a fixed rate regardless of the kind of
16 need, medium, if I'm correct. In other words, paintings,
17 of photographs and--

18 A Yes, oh yes.

19 Q You disagree on this two-second question. In
20 what other real respects to you disagree with the
21 Public Broadcasting proposal?

22 A Okay. (1) I disagree with the audio-visual,
23 it's outside the parameters of the statute, totally in-
24 appropriate, is in competition with the rights of the visual
25 artists already granted. Foreign rights, foreign

1 distribution, likewise, is outside the parameters of the
2 statute, is inappropriate, the local usage we've talked
3 about. I think that their local use must be covered.
4 The statute specifically identified Public Broadcasting
5 entity as being a Public Broadcasting station. It is your
6 obligation, I respectfully submit, to fix royalties on
7 those uses, regardless of how difficult it might be.

8 It is inappropriate and improper to say
9 we want a "free ride", even if you assumably tack it on
10 to the price you're doing on national, because there's no
11 basis for saying that this is adequate monetary proceedings.

12 I don't have the license right in front of me
13 to go through. I'll get it in a moment. I believe and
14 agree with a position taken by Mr. Green--I think I've
15 mentioned it here--the burden on reporting the work of the
16 works used must be on PBS. So long as they have the
17 names and addresses of the artists, it is simple enough to
18 send out the money either to an agent who is representing
19 them, or at the agent's request, sending them directly to
20 that artist.

21 If they do not have the name of the artist, they
22 should search to find the name of the artist. If they
23 cannot ultimately find it, they have to decide whether
24 they're going to use that work or another work. And then
25 put it into some sort of a file that is easily available

1 to agencies that would then determine who that artist
2 is so that artist could receive compensation.

3 Q You feel that the length of search somehow
4 be related to whatever fee is ultimately established?

5 A The length of search?

6 Q Well, if you say \$100, I mean you're not going
7 to spend more than \$100 worth of man hours looking for that
8 person.

9 A As a practical matter, I think that's correct.
10 There is a rule of reason. There should be a reasonable
11 effort at the source, because if there isn't a reasonable
12 obligation at the source, then the producer or the
13 television station will say "I don't know who it is;
14 Ultimately, after three years the money is going to come
15 back to us anyhow if we don't identify". There is no
16 inducement to find out who the artist is.

17 On the contrary, there's an inducement not to
18 find out because the money is going to a sheet after three
19 years to PBS, which I think is unfortunate. I would
20 like to see some purpose, it's my suggestion that it be
21 put in some sort of fund for the visual arts. I don't
22 know whether that's within your power to do or not, but
23 it's certainly appropriate to do.

24 This goes to the two-second question. With
25 their music licenses, they talked about, I think it was

1 150, \$100 for featured use and \$50 for non-featured use.
2 It's easy to talk about two seconds or less perhaps, or
3 one second or less as being a non-featured use. There are
4 other ways to find it. But in the music industry, you've
5 got a non-featured payment. I think there's an unfortunate
6 distinction; I see no validity to that.

7 I don't remember what other provisions there
8 were that I found to be inappropriate, other than what
9 I've mentioned in my presentation.

10 Q One of them might be, and I forgot to
11 mention it, that the competitive uses you want to be
12 reimbursed for?

13 A Yes, yes. Traditionally, in other areas of
14 the communications industry, in television particularly,
15 there is a concept of residuals. In France, there is
16 payment for residuals, for secondary, tertiary uses,
17 et cetera.

18 To have a blanket fee for one work that is
19 used 20 times, being the same as the fee that's used
20 once is unfair to the person whose work is used 20 times
21 as against the person whose is used once. I understand
22 administratively it's much simpler to do it that way. But
23 I do think that there should be, in addition to a time
24 limit, which Mr. Aleinikoff has conceded might be three
25 years or something like that, there also be a use limitation.

1 The example that I gave, although it was a
2 film strip, there was a limitation by NET, in Time and
3 in a number of plays. I am not technically capable of
4 giving you right now the number of plays that would be
5 reasonable. But the concept is right, that there be
6 compensation for use.

7 Now, when Mr. Smith said \$25 per use, you are
8 saying \$25 for free use for five years, unlimited use
9 for five years. I think that's wrong. I think there should
10 be residual payments on say, first three uses. The
11 concept of full screen display being what they paid for it,
12 I think is nonsense.

13 Now, is the question on the identification, which
14 I think is very interesting and I think the Tribunal
15 ought to take cognizance of. In view of the ambiguous
16 status of works published prior to January 1, 1978, as
17 Mr. Aleinikoff states, there is an ambiguous status as
18 to who the proprietor is, whether indeed it is copyrighted.

19 Life is very simple. If PBS deals with
20 organizations such as VAGA or artists directly, rather than
21 having to deal with museums and so on and so forth. If
22 the identification, however, for the protection of the
23 artists, and the protection of organizations such as VAGA,
24 it seems to me, need not go beyond what the compulsory
25 license fee otherwise would be. For example, if in fact, we

1 are wrong, and in one particular instance, somebody
2 else has the right to grant that compulsory license or
3 get that fee, I think it is a correct statement of the law
4 that the only recovery that person would receive would be
5 what that compulsory license would have been, that
6 dollar amount, that royalty.

7 It is very difficult to ask an artist to
8 indemnify, not knowing that his identification is, in fact,
9 limited. I would urge that the license limit the
10 indemnification to the amount of a compulsory license,
11 taking into account that there is a question. But the
12 liability would, in no event, be greater than that
13 compulsory license royalty. VAGA would be prepared, with
14 its artists, that the money flow through VAGA, to retain
15 a certain percentage of that in our account, in the event
16 there is a legitimate claim by some third person that he
17 or she, instead of one of our members, is entitled to that
18 royalty.

19 But if the indemnification, in turn, was greater
20 than that compulsory license, it's--I believe as a matter
21 of law, the liability would not be greater. I believe that's
22 my view on the license. And if I could state as a
23 conclusion: I think it's terrible.

24 CHAIRMAN BRENNAN: Commissioner James, I believe,
25 has a question.

1 BY COMMISSIONER JAMES:

2 Q On Page Ten, you indicate that a fund should
3 be returned to Public Broadcasting for purposes of
4 commissioning new works for visual arts. And I'm assuming
5 that that's the same fund that Mr. Smith was talking about
6 would be set up in a trust fund for those artists that
7 were not known. And procedure would be developed to find
8 them.

9 My question is: do you think that this Tribunal,
10 under the statute, has the authority to indicate where non-
11 claimed fund are to be used, or how they should be used?

12 A To the extent that the Tribunal has the right
13 to authorize these funds to a sheet to PBS in the first
14 instance after three years, I would suggest without a deep
15 study of the legislative history, that their concomitant
16 right would be to say how, as to a sheet, a sheet to
17 PBS for a, b, c and d purposes. I would think that--

18 CHAIRMAN BRENNAN: We can surely make a
19 recommendation.

20 MR. BRESSLER: Yes.

21 BY COMMISSIONER JAMES:

22 Q One other question. Does VAGA have a contract
23 with, or do they grant a license to CBS?

24 A No, sir. We have just started. We have not
25 granted a license, as of this point, with CBS. We've sent

1 them a list of our members.

2 Q If CBS uses a picture or something, how does
3 the artist, the photographer get paid?

4 A At this point, I think--if I could preface my
5 answer.

6 Q Sure.

7 A It goes to some extent to what Mr. Aleinikoff
8 was saying. By reason of CBS knowing that there is a
9 central clearinghouse, at least for some artists, even if
10 inferentially the work might be considered in the public
11 domain, they will come to us and say "we would like the
12 right to reproduce a work by X". And we will then say "Our
13 standard fee--" and we're developing standard fees for
14 commercial, television, for book industry, so on, so forth--
15 "Our standard fee is based on blank and is blank dollars".

16 Q Do you have a standard fee now for--

17 A We are developing a standard fee.

18 Q Oh, I see. Non-commercial.

19 A For commercial television.

20 Q All right.

21 A And then they will say "That's too much". Then
22 we will perhaps negotiate, if it's outside the constraints
23 of their budgetary constraints. But it will be a private
24 negotiation. One of the benefits of organizations such as
25 ASCAP, or VAGA in its infancy, is that CBS will know where

1 to go. As a result of that, they can stay on the right
2 side, both morally and legally. Instead of having to
3 search for the artist, they know where to go.

4 Historically, the local stations have not paid
5 more than a rental fee, maybe partially out of ignorance
6 and partially out of not knowing where to go to get the
7 rights. I know that as a private attorney, I have sometimes
8 gotten a request for reproduction rights nine months or
9 a year after the request was made, because the user just
10 did not know where to go.

11 In answer to you, sir, CBS has already asked
12 us for our list, of the SPADEM list and the VAGA list.
13 They haven't asked for Russia's because it's that thick.
14 But they've asked for it; we've sent it to them. The
15 assumption is that if they want to use a Rauschenberg
16 or a Motherwell, or what have you, or Picasso, they will
17 now come to us and say: we would like to use this for this
18 purpose. And we will negotiate a fee. And there won't
19 be a residual on that fee.

20 Q Just out of curiosity--I'm assuming from your
21 statement here that you've represented clients in this
22 field before?

23 A That's right.

24 Q Are you representing any that have sold their
25 works to commercial broadcasting?

1 A I gave you the one example, the one--

2 Q 14 years ago.

3 A Yes. I, the past 14 years ago--

4 Q I'm just trying to figure out what is the
5 going rate for--

6 A As I suggested before, I will within the next--

7 Q Okay.

8 A I'll search my files and see what I've got on
9 that.

10 COMMISSIONER JAMES: No further questions.

11 CHAIRMAN BRENNAN: Anything further, gentlemen?

12 MR. ALEINIKOFF: Yes. We are very pleased
13 that VAGA has been organized. Mr. Bressler said some
14 unkind things about our work, although he appreciates us
15 individually I think.

16 But we're very pleased that he is, what I think
17 of, as the coming Harry Fox of the picture business, the
18 fine art business anyhow. This will give us some way of
19 approaching a problem that we have simply not had a
20 way to do before. But it is a--it may be helpful in getting
21 it started. Who knows? We hope so. So, when you ask
22 Mr. Bressler a question about VAGA, please remember that
23 it is a new agency, just beginning its operation, has
24 very little past, actual history. And there are other
25 organizations of fine artists who either are or want to be

1 in the same business of representing artists to their
2 reprinted residual, whatever you want to call them, their
3 painting rights. So, they are to be taken into consideration
4 too. And we've had to take them into consideration too.

5 When you get done with all these organizations
6 there are two other things to remember about each of the
7 organizations. Most of them are not licensed by authors
8 to license the work. The organization itself can't
9 enter into a license agreement, like the photographers
10 organization can't enter into a license agreement at
11 this point with us or anyone else with standard terms or
12 conditions.

13 We had, we thought, come up with a joint
14 recommendation. VAGA does have this right and the
15 Illustrators Guild have this right, but many do not,
16 because--and this is a real problem--because if they
17 want to get into this business, they have to go back and
18 get authorization from the author as agent or the creators,
19 that they will comply with whatever the agent negotiates
20 on their behalf.

21 I don't think this is true for photographers
22 today. And that's one of the major problems we have on
23 photographs. I don't think the ASMP can enter into
24 a license for its members. We've been through, I think,
25 our discussion of repeat uses many, many times about how

1 necessary those repeat uses are, how important it is.
2 And I certainly said several times today, I think that this
3 is a minor element, unless one small element of a
4 program which otherwise would have wide and long use.

5 And in a music field, Harry Fox license, there
6 are provisions for renewals. And those renewals cost
7 more money. And if they can be serviced cheap--as a matter
8 of fact, I'm not sure whether you can service a single
9 \$25 repayment for less than \$100 or maybe less than
10 \$500. But a big question is how expensive is it to
11 service the renewal payment just in terms of keeping a
12 tickler sheet, time chart and having to go through the process
13 and all the rest, is it worth the \$25 even to the author.
14 It costs more than \$100 to the organization that has to do
15 it.

16 We have computers that automatically write
17 checks. On audio-visual and foreign use, this has been
18 raised several times--does it come within 118, is it
19 outside of 118. The first, I have two comments on that.
20 It's terribly important for us in audio-visual that the
21 schools in America be able to show the programs that we
22 have made.

23 And we intend to go on in our voluntary agree-
24 ment to obtain that right--SESAC, BMI. There is an extra
25 license, as I said before, standard for audio-visual

1 uses that we hope will become so standard it will
2 automatic, as in the case of Harry Fox, regarding rights.
3 If, as Mr. Bressler said, I think it can be simulated
4 to music, those rights are in the voluntary agreement.

5 We hope that the Tribunal will agree with us
6 that once a Public Broadcasting program has been made,
7 these ancillary uses can come within Section 118. We
8 hope they will give us a try and we hope that they will
9 provide for it. If they found differently or they would
10 like a brief on it, we'll be glad to submit it to them.
11 But it's our view that the use of the Public Broadcasting
12 program can conceivably be regulated by the Tribunal,
13 within Section 118.

14 More than that, let's get to another similarity
15 with music, is the indemnity provision. I don't know
16 whether Section 118 calls for warranties and indemnities.
17 The owner represents that he is the owner. And if he is
18 not the owner, whatever liability he has, I don't know if
19 it's compulsory license--if he claims to be the owner, he
20 collects the payment as the owner. The least we can have
21 is a warranty that he is that owner; that if somebody
22 else sues us that he protects us. That is part of the
23 conditions of the payment.

24 That is something that nobody in the music
25 industry, including our friends ASCAP has in any way

1 objected to. It's standard. That's what you're taking
2 the license for. I think it should be exactly the
3 same thing with residual art. And if there are some
4 artists who don't know what they own, and there are agencies
5 such as VAGA, I think it's up to them to decide what they
6 own before they collect the payment for it.

7 One more thing, if I could, is the fair use
8 thing-- just to be sure we understand each other as far
9 as what 118 covers. My understanding of Section 118 is
10 that it is addition to the fair use privilege, even to the
11 extent that there is a fair use privilege under that statute,
12 that fair use privilege for commercial or non-commercial
13 or any other way takes precedence, and you have the right
14 to make that fair use.

15 I have always understood Section 118 to be
16 related to fair use. Now, when you get two seconds in
17 the photograph, I begin to wonder if there's any fair use
18 at all. Maybe if we said one-half of a second, that would
19 be fair use. But I'm beginning to think that the people
20 who own or illustrate the thing, there is no such thing
21 as fair use.

22 CHAIRMAN BRENNAN: Didn't the Congress contem-
23 plate with regard to certain types of works, that fair use
24 would be very strictly interpreted?

25 MR. ALEINIKOFF: Certainly did. And I think

1 you'll find the comment on Section 107 says it will
2 be strictly interpreted. But in motion pictures and for
3 still prints, it does and I remember the comment, either
4 the House or the Senate Report, that says that some uses
5 of those can be considered fair use.

6 And all I'm saying is we went down to two
7 seconds. I don't know how fair beyond that it can go.

8 CHAIRMAN BRENNAN: Before I forget our suggestion
9 about the brief--I believe my colleagues feel it would be
10 desirable to furnish us with a brief in support of your
11 position on the license--

12 MR. ALEINIKOFF: May I just ask one question
13 on that? If we do have a brief on it, are we still tied
14 down to Monday?

15 COMMISSIONER JAMES: Absolutely.

16 MR. BRESSLER: I just wanted to make a comment
17 on what Mr. Aleinikoff has just struck down. If any PBS
18 entity, local, national network, foreign, audio-visual or
19 what have you, wants to do a program on viewing an
20 exhibition of any one of the VAGA artists, it can do so.
21 And it can have the illustrations on the screen or one
22 second, five seconds, ten seconds if it wishes to do
23 in depth interview and criticism of that show. Clearly
24 we know what first use covers. It is not covered with
25 visual arts by the length of time it is on the screen.

1 But as far as criticism is concerned, and other
2 traditional areas, that is what 107 is still about. It's
3 not measured by length of time.

4 CHAIRMAN BRENNAN: This concludes the public
5 hearings in the Public Broadcasting proceeding. We will
6 stand recessed at the call of the Chair.

7 (Whereupon, at 12:20 p.m., the proceedings were
8 concluded.)
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